FILE COPY

Office - Supreme Court
FILED
MAY 23 193
CHARLES ELMORE CR
CLE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER,
Petitioner,

vs.

CARTER COAL COMPANY, *et al.*,
Respondents.

No. 651

GUY T. HELVERING, individually and as Commissioner of Internal Revenue of the United States, *et al.*,
Petitioners,

vs.

JAMES WALTER CARTER, *et al.*,
Respondents.

MOTION OF JAMES WALTER CARTER, PETITIONER IN NO. 636 AND RESPONDENT IN NO. 651, FOR IMMEDIATE ISSUANCE OF MANDATE AND FOR COSTS

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
RICHARD H. WILMER,
Transportation Building,
Washington, D. C., and
15 Broad Street,
New York, N. Y.
Counsel for James Walter Carter.

PRESS OF W. F. ROBERTS COMPANY, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER,

Petitioner,

vs.

CARTER COAL COMPANY, *et al.*,

Respondents.

No. 651

GUY T. HELVERING, individually and as Commissioner of Internal Revenue of the United States, *et al.*,

Petitioners,

vs.

JAMES WALTER CARTER, *et al.*,

Respondents.

MOTION OF JAMES WALTER CARTER, PETITIONER IN NO. 636 AND RESPONDENT IN NO. 651, FOR IMMEDIATE ISSUANCE OF MANDATE AND FOR COSTS

Now comes James Walter Carter, petitioner in No. 636 and respondent in No. 651, by and through his counsel, Frederick H. Wood, William D. Whitney and Richard H. Wilmer, and respectfully moves the Court:

(1) To cause the immediate issuance of the mandate to be directed to the court below pursuant to the judgment of this Court entered May 18, 1936, and

(2) To allow him his costs and direct the Clerk in the preparation of the mandate to include therein costs in favor of said James Walter Carter, petitioner in No. 636 and respondent in No. 651, against Guy T. Helvering, M. Hampton Magruder, Clarence C. Keiser, John B. Colpoys, Homer S. Cummings, Stanley Reed and Leslie C. Garnett, respondents in No. 636 and petitioners in No. 651, or solely against M. Hampton Magruder, one of the respondents in No. 636 and one of the petitioners in No. 651;

and in support of said motion assigns the following:

I.

Immediate Issuance of Mandate

By the final decree (R. 216D and 216E) entered by the Supreme Court of the District of Columbia on December 10, 1935, an injunction or stay pending final determination of the cause on appeal was granted

> "upon the express condition that on or before the 2nd day of January, 1936, and on or before the 1st day of each succeeding month thereafter, during the pendency of this cause on appeal, there shall be paid to a depository to be approved * * * a sum equal to one and one-half per centum (1½%) of the sale price at the mine on sales or other disposals of bituminous coal by the defendant Carter Coal Company during the period beginning with November 1, 1935, for which a tax payment under said Act shall be due, said sum to be held by the depository pending the final outcome of this litigation * * *."

Under the Bituminous Coal Conservation Act of 1935, an amount, approximately $5,000, representing 1½% of the sale price at the mine on sales or other disposals of bituminous coal by the Carter Coal Company, will be due, and until the decree entered below is modified pursuant to the mandate of this Honorable Court, will be required to be deposited with the depository, on or before the 1st day of June, 1936.

Under the rules of this Honorable Court, the mandate will not issue until the expiration of 25 days from the date of its judgment entered herein on May 18, 1936. During this period under the terms of the decree below an additional amount will be required to be deposited with the depository approved by the court, and to make such deposit will inflict undue and unnecessary hardship upon the Carter Coal Company and upon James Walter Carter, one of its principal stockholders. In view of the decision of this Honorable Court holding the said Bituminous Coal Conservation Act of 1935 unconstitutional the requirement of such deposit is inequitable and unjust. There has already been deposited with the depository, pursuant to the final decree below, an amount in excess of $35,000, and the early issuance of the mandate will relieve against further loss engendered by the present deprivation of this sum.

II.

Allowance of Costs

James Walter Carter, the petitioner in No. 636 and the respondent in No. 651, has personally, and without contribution from other persons in common interest, defrayed all of the costs involved in the lengthy

trial below, the cost of the record and other costs incident to the proceedings in this Court. One of the burdensome costs so incurred by said James Walter Carter has been in connection with the preparation of the lengthy and involved record before the Court. The cost of the preparation of the record has been extraordinarily heavy in view of the numerous and lengthy exhibits and other voluminous evidence on behalf of the Government officer defendants in the court below, requiring great expense in reproduction in the record here. By far the preponderance of the bulk of the record and the expense attendant to its preparation were made necessary by reason of the action of the Government officer defendants in pursuing the proof of the so-called economic defenses set up in Part II of their answer (R. 33-37). While the record itself speaks abundantly in support of this assertion, the Court's attention is respectfully invited to the response of the Government officer defendants filed in opposition to the motion to advance and specially set the case for hearing below, wherein the Government officer defendants in support of their contention that the trial of the cause below be deferred until November 25, 1935, stated (R. 48):

> "In the view of these defendants the constitutionality of said Act depends upon the existence of the burdens, dislocations, restraints and interruptions to interstate commerce in bituminous coal specified in the separate defense set up in subdivision II of defendant's answer and upon the facts relative to the causes and effects thereof, as therein set forth, and also upon facts relative to the reasonableness under the due process clause of the Fifth Amendment of the regulatory provisions of the proposed coal code. All of these

averments are denied by plaintiff and involve the determination of issues of fact which, due to the magnitude of the bituminous coal industry and the competitive conditions existing as between the various producing fields and the consuming markets, are very complex and require, in order that they may be properly presented in evidence, the examination of many witnesses from many different sections of the country, the inspection of many documents and the preparation of many exhibits.

* * * * *

"The Act in question here was approved August 30, 1935. This suit was filed on August 31 and became at issue with the filing of plaintiff's reply on October 5. As above stated, the factual issues have to do with complex operations and interrelations of an immense nation-wide industry. The determination of these issues is of national concern and it is, of course, important that government counsel be given a full opportunity to adequately prepare the case and present the facts in evidence in a proper and orderly fashion.

But for the introduction of the expansive testimony by the Government officer defendants in support of the so-called economic defenses set up in Part II of their answer, the trial of the cause below would have been greatly shortened and the record here would have been relatively short and the preparation thereof relatively inexpensive.

Fully cognizant of Rule 32, subsection 4, of this Honorable Court, providing that

"No costs shall be allowed in this court either for or against the United States, except where specially authorized by statute and directed by the court."

the Court nevertheless is urged to allow costs to James Walter Carter and to direct the Clerk to include costs in the mandate against the Government officer defendants, for the reasons that:

1. The Government officer respondents in No. 636 and petitioners in No. 651 are sued in their individual capacities and the suit brought by James Walter Carter against said individuals is not a suit against the United States. It is a settled doctrine of this Court that the attempt of a Government officer to enforce an unconstitutional statute is a proceeding which he undertakes without authority and constitutes an illegal act which strips him of his official character and subjects him in his person to the consequences of his individual conduct. It is clearly established that a suit to enjoin an administrative official from doing an unauthorized or unconstitutional act is not a suit against the sovereign. This principle has been settled as respects State officers by a long line of cases following *Ex parte Young,* 209 U. S. 123, and as respects Federal officers by a similar line of cases following *Philadelphia Co.* v. *Stimson,* 223 U. S. 605. In the latter case, the Court said:

> "* * * The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. * * *"

2. There is precedent in this Court for allowing costs against Government officer defendants. In the case of *United States, ex rel. McBride* v. *Schurz,* 102 U. S. 378, in a suit for mandamus against the Secretary of the Interior, the Court gave judgment to the

relator for his costs. The original judgment of the Court provided that each party pay his own costs, and on a motion subsequently made to modify the order and give judgment to the relator for his costs, Justice Miller, speaking for the Court, said, at page 407:

> "Our first impression was that as the defendant was sued in regard to the manner in which he had discharged certain official duties as Secretary of the Interior, in which no intentional wrong was charged or proven against him, it would be unjust to make him pay the costs of the proceeding out of his own pocket.
>
> "But a careful examination of the authorities leaves us no option but to follow the rule that the prevailing party shall recover of the unsuccessful one the legal costs which he has expended in obtaining his rights.
>
> "In *Kendall* v. *United States* (12 Pet. 524), the leading case establishing the right of a citizen to the use of the writ of *mandamus* to compel a public officer to perform a duty merely ministerial, the relator recovered his costs. The duty in that, as in the present case, was one enjoined upon a cabinet officer, which he refused to perform. It is obvious that he thought he was right in refusing to do the act demanded of him, yet this court, as shown by the report of the case, rendered judgment for costs against him.
>
> "In *United States* v. *Boutwell* (17 Wall. 604), which was the case of a writ of *mandamus* against the defendant as Secretary of the Treasury, and which the court held to be abated by his retirement from office, it was said: 'It is the personal default of the defendant that warrants the impetration of the writ, and if a peremptory writ of *mandamus* be awarded, the costs must fall upon the defendant.' And it is argued that as

it would be unjust to make the successor in office of the delinquent secretary pay the cost of defending the action of his predecessor, the writ must of necessity abate.

"We cannot, in the face of these cases, refuse the order for costs, however much we might wish it were otherwise. There may be a contingent or other fund of the department out of which they can be paid. If there is none, Congress may provide for it or enact generally that when the officers of the government are sued with reference to the manner in which they have performed or failed to perform their official duties, they, as in revenue seizures and similar cases, shall be relieved from the expense of the suit if they have acted with good motives and upon reasonable grounds.

"The relator must have judgment for his costs."

In so far as liability for costs is concerned, there would appear to be no distinction between the refusal of a Government officer to perform his official duty and the attempt on the part of such a Government officer to perform an unauthorized act. In both instances the Government officer acts without warrant of law although in both instances he may act in good faith.

In *Hill* v. *Wallace,* 259 U. S. 44, a stockholder's suit wherein, as here, Government administrative officers were joined with the stockholder's company as defendants, the mandate carried costs in favor of the successful stockholder.

3. The petitioner in No. 636, James Walter Carter, having individually borne all of the expenses involved in the lengthy trial in the court below, and the costs in this Court, including the printing of the vo-

luminous record, on merit and equitably is entitled to judgment against the Government officers for his costs. Should the Court have doubt as to the propriety of entering judgment for costs against the Government officers it is asserted that there is an undoubted availability of funds at the disposal of such officers to pay such judgment. The attention of the Court, likewise, is invited to the fact that the defendant M. Hampton Magruder, Collector of Internal Revenue for the Collection District of Maryland, should judgment for all costs be rendered against him solely, by Title 28, U. S. C. § 842 (R. S. Sec. 989), can effect the payment thereof from the Treasury by obtaining a certificate of probable cause from the court below. Even if the suit be considered one against the United States, nevertheless under Rule 32, subsection 4, of this Honorable Court, there being specific authorization by statute, the Court is free to direct the allowance of costs to James Walter Carter, against M. Hampton Magruder.

WHEREFORE, James Walter Carter, petitioner in No. 636 and respondent in No. 651, respectfully moves the Court for immediate issuance of the mandate, for allowance of his costs and to direct the Clerk to include in the mandate costs against the Government officer respondents in No. 636 and petitioners in No. 651, or against M. Hampton Magruder, one of the respondents in No. 636 and one of the petitioners in No. 651.

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
RICHARD H. WILMER,
Counsel for James Walter Carter.